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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III
841 Chestnut Building
Philadelphia, Pennsylvania 19107-4431

November 2, 1994

Pamela J. Lazos (3RC22)
Assistant Regional Counsel
U.S. Environmental Protection Agency-Region III
841 Chestnut Building
Philadelphia, PA 19107-4431

Peter Parker
Harbucks, Inc.
11248 Falls Road
Lutherville, MD 21093

Re: Revere Chemical Site
Harbucks, Inc.
EPA Docket No. III-93-004L

Dear Ms. Lazos and Mr. Parker:

I enclose your copies of the Probable Cause Determination that I have filed with the Regional Hearing Clerk. The Probable Cause Determination concludes this proceeding.

Please call me at (215) 597-9853 if you have any questions regarding the Probable Cause Determination or procedural aspects of this matter.

Thank you for your cooperation in this matter.

Very truly yours,

Benjamin Kalkstein

BENJAMIN KALKSTEIN
Regional Judicial and Presiding Officer

Enc.

cc: Regional Hearing Clerk (3RC00)

AR000168

BEFORE THE UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY-REGION III
841 CHESTNUT BUILDING
PHILADELPHIA, PA 19107

In the Matter of	:	
	:	
Harbucks, Inc.	:	
Revere Chemical Site,	:	
Bucks County, PA	:	EPA Docket No. III-93-004L
	:	
	:	

PROBABLE CAUSE DETERMINATION

This proceeding involves the Federal Lien provision of Section 107(l) of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9607(l).[1] Harbucks, Inc. has challenged EPA's July 17, 1993 Notice of Intent to File Notice of Federal Lien on Harbucks's property, located in Nockamixon Township, Bucks County, Pennsylvania. The

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[1] Section 107(l) of CERCLA provides:

(1) In general

All costs and damages for which a person is liable to the United States under subsection (a) of this section (other than the owner or operator of a vessel under paragraph (1) of subsection (a) of this section) shall constitute a lien in favor of the United States upon all real property and rights to such property which --

(A) belong to such person; and

(B) are subject to or affected by a removal or remedial action.

(2) Duration

The lien imposed by this subsection shall arise at the later of the following:

(A) The time costs are first incurred by the United States with respect to a response action under this chapter.

(B) The time that the person referred to in paragraph (1) is provided (by certified or registered mail) written notice of potential liability.

Such lien shall continue until the liability for the costs (or a judgment against the person arising out of such liability) is satisfied or becomes unenforceable through operation of the statute of limitations provided in section 9613 of this title. 42 U.S.C. 9607(l).

admininistrative record supports the determination that EPA has probable cause, or a reasonable basis to believe that the requisite statutory criteria have been met, to file a CERCLA Federal lien against this property.

BASIS FOR THE PROCEEDING

Although CERCLA itself does not provide for challenges like Harbucks', the Agency affords property owners an opportunity to present evidence and to be heard to property owners when it files lien notices. While the case is not binding law in EPA Region III (Third and Fourth Circuit Courts of Appeal), at least one court has decided that the Agency must provide some procedural safeguards to property owners whose property may be subject to CERCLA Federal Liens. Under Reardon v. United States, 947 F. 2d 1509 (1st Cir., 1991),...the minimum procedural requirements would be notice of an intention to file a notice of lien and provision for a hearing if the property owner claimed that the lien was wrongfully imposed...EPA may only need to demonstrate probable cause or reason to believe that the land would be "subject to or affected by" a cleanup, or that the landowner was not entitled to an "innocent landowner" defense. 947 F. 2d 1522.

SITE HISTORY

The Revere Chemical Site is a barren, 113-acre tract of land in rural Bucks County, Pennsylvania. The Site is bordered on one side by U.S. Route 611 and by farmland on the other three sides. Two unnamed tributaries of Rapp Creek flow through the Site. Rapp Creek is a tributary of Tinicum Creek, which flows into the Delaware River.

In 1964 the Site was acquired by Circuit Foil Corporation, which transferred title to the Site to the Six-Eleven Corporation. The Six-Eleven Corporation leased the Site first to Echo, Inc. and then to the Revere Chemical Corporation, and the Site was operated by these tenants as a metal reclamation facility from 1964 until it closed in 1969. Harbucks, Inc. is the current owner of the Site, having first acquired it from the Monumental Collection Agency, Inc. in 1975. Monumental acquired title by Sheriff's sale. In 1979 the Site was purchased by Area Homes, Inc. at a real estate tax sale. Harbucks regained title in October 1984 by court order invalidating the tax sale. Harbucks' purpose in purchasing the Site was to mine an extensive deposit of argillite, an aggregate stone used in highway construction.

About 30 acres of the Site were used in Echo's and in Revere's metal reclamation activities. Several reclamation process buildings, some 19 storage and process lagoons, a waste lagoon and a fresh water pond comprised the processing area. Liquid wastes

were sprayed on fields on the Site.

In 1966 the Bucks County Department of Health fined the Site operator, Echo, Inc., for unauthorized waste discharges into surface waters adjacent to the Site. The Commonwealth of Pennsylvania also cited the operators for water pollution violations and improper wasted disposal activities. The metals reclamation operation was abandoned in 1969.

The Commonwealth of Pennsylvania (Department of Health) initiated a cleanup project at the Site in 1970 because of public health concerns. Large volumes of waste liquid and sludge were removed from the Site. Several lagoons were covered or otherwise closed. In 1973 the Pennsylvania Department of Environmental Resources issued an order for the prevention of erosion, sedimentation and pollution, citing the leaching of heavy metals to the waters of the Commonwealth.

EPA conducted a removal operation in March of 1984, removing drums containing hazardous substances, contaminated soils and other material. Sampling of the drummed substances, soil and surface waters revealed the presence of arsenic, beryllium, cadmium, chromium, copper, lead, nickel and zinc. Because of the extent of contamination and the threat to human health and the environment, the Site was placed on the CERCLA National Priorities List in 1987.

In 1988 EPA issued an Administrative Order by Consent, requiring several of the identified waste generators to conduct a Remedial Investigation/Feasibility Study of the Site. In 1991 EPA issued a unilateral Administrative Order requiring identified waste generators, site owners and operators to perform specified response work (removal of excavated drums and associated wastes that had been staged on site, implementation of soil erosion and sedimentation controls) at the Site.

Late in December of 1993 EPA issued a Record of Decision addressing soil and solid waste remediation at the Site. EPA continues to work with a number of the potentially responsible parties on Site remediation matters.

PROCEDURAL HISTORY

This proceeding was initiated under Federal CERCLA Lien Procedures issued August 5, 1992 by the Regional Counsel for EPA's Region III. By letter dated July 17, 1993, EPA notified Harbucks of EPA's intent to file a notice of Federal Lien on the property. Harbucks' September 30, 1993 letter responding to EPA's July 17, 1993 notice of intent, triggered the December 7, 1993 assignment of the Regional Judicial and Presiding Officer to preside over the lien proceeding. In accordance with the Region III procedures EPA

filed its Reply to Harbucks' September 30, 1993 letter on January 7, 1994, together with the administrative record of the lien. By letter dated January 12, 1994, the Regional Judicial and Presiding Officer scheduled a conference call among the parties' representatives for January 27, 1994. The Regional Judicial and Presiding Officer directed the parties to exchange document and witness lists on or before February 18, 1994. EPA's submission was timely but Harbucks did not provide any list until February 28, when it telefaxed a handwritten witness list to EPA's counsel. The actual proceeding was scheduled for March 3, 1994, but was postponed twice at Harbucks' request, until April 13, 1994. EPA filed its post-proceeding submission on May 16, 1994. Harbucks did not file a post-proceeding submission, although the record was kept open until October 24, 1994 to allow Harbucks to do so.

By memorandum dated July 29, 1993 EPA's Enforcement Counsel for Superfund and Director of Waste Programs Enforcement issued Supplemental Guidance on Federal Superfund Liens (OSWER Directive No. 9832.12-1a), which governs CERCLA Lien proceedings initiated after that date. Although the Region III procedures govern this proceeding, the Regional Judicial and Presiding Officer has striven to assure that no part of this proceeding is inconsistent with OSWER Directive No. 9832.12-1a.

Accordingly, the Regional Judicial and Presiding Officer has reviewed the administrative record and the parties' submissions and has taken into account the matters discussed during the April 13 proceeding, which has been transcribed. The issue is whether EPA has probable cause, or a reasonable basis to believe that the requisite statutory criteria have been met, to file a notice of CERCLA Federal Lien on Harbucks' property. There are five elements to this probable cause determination:

a. Harbucks' ownership of the property in question;

b. Whether the property is subject to or affected by a removal or a remedial action;

c. Whether EPA incurred costs in the removal/remedial action;

d. Whether Harbucks was notified in writing of its potential liability; and

e. The apparent absence of a defense under CERCLA § 107(b), 42 U.S.C. § 9607(b).

During a February 4, 1994 conference call among the parties and the Regional Judicial and Presiding Officer, Harbucks' representative conceded that Harbucks had received EPA's February 19, 1987 letter notifying Harbucks of its potential liability. The

record shows this letter was received on February 26, 1987, satisfying element "d." (Administrative Record, AR000046-AR000049). During the February 4 conference call Harbucks refused to concede any other issues.

Late in the April 13 proceeding, Harbucks' representative conceded ownership of the property, conceded that the property was subject to or affected by a removal or remedial action, and conceded that EPA had incurred costs in the removal/remedial action.(Transcript, pp. 30, 367).

CERCLA DEFENSES

The remaining dispute is therefore focussed on the issue of whether the legal defenses to CERCLA liability, set forth in § 107(b) of the Act, 42 U.S.C. § 9607(b), appear to apply to Harbucks' situation:

> There shall be no liability under subsection (a) of this section for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by-
>
> > (1) an act of God;
> > (2) an act of war;
> > (3) an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant (except where the sole contractual arrangement arises from a published tariff and acceptance for carriage by a common carrier by rail), if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions; or
> > (4) any combination of the foregoing paragraphs.

In applying the "third party" defense criteria, reference must be made to relevant portions of CERCLA's definitional section 101, 42 U.S.C. § 9601:

> (35)(A) The term "contractual relationship", for the

purpose of section 9607(b)(3) of this title, includes, but is not limited to, land contracts, deeds or other instruments transferring title or possession, unless the real property on which the facility is located was acquired by the defendant after the disposal or placement of the hazardous substance on, in, or at the facility, and one or more of the circumstances described in clause (i), (ii), or (iii) is also established by the defendant by a preponderance of the evidence:

(i) At the time the defendant acquired the facility the defendant did not know and had no reason to know that any hazardous substance which is the subject of the release or threatened release was disposed of on, in, or at the facility.
(ii) The defendant is a government entity which acquired the facility by escheat, or through any other involuntary transfer or acquisition, or through the exercise of eminent domain authority by purchase or condemnation.

In addition to establishing the foregoing, the defendant must establish that he has satisfied the requirements of section 9607(b)(3)(a) and (b) of this title.

(B) To establish that the defendant had no reason to know, as provided in clause (i) of subparagraph (A) of this paragraph, the defendant must have undertaken, at the time of acquisition, all appropriate inquiry into the previous ownership and uses of the property consistent with good commercial or customary practice in an effort to minimize liability. For purpose of the preceding sentence the court shall take into account any specialized knowledge or experience on the part of the defendant, the relationship of the purchase price to the value of the property if uncontaminated, commonly known or reasonably ascertainable information about the property, the obviousness of the presence or likely presence of contamination at the property, and the ability to detect such contamination by appropriate inspection...

HARBUCKS' ARGUMENT

In its September 30, 1993 letter challenging imposition of the CERCLA lien, Harbucks suggested that EPA look to other potentially responsible parties to recover the CERCLA response costs incurred and alleged that the filing of a lien would cause Harbucks "irreparable and probably lasting harm. These arguments go to EPA's exercise of enforcement discretion, and will not be addressed

in this probable cause determination. Harbucks also argued:

> We are in no way responsible for the conditions which exist on the Revere site and everyone (EPA, PADER, members of the Revere Steering Committee, even the politicians who engineered the placing of this property on the Superfund list without cause or justification) concedes that not one ounce of deleterious material has been placed on the property by us since its purchase. I might add that the property was only purchased after its "cleanliness" was warranted to us by PADER which had spent some $500,000 curing "all existing and perceived environmental problems" prior to our purchase.

As it evolved during the proceeding on the merits, Harbucks' argument was that they had diligently attempted to document the status of the Site before purchase and were assured by Pennsylvania officials that the Site was "clean;" that Harbucks had never introduced any kind of contamination onto the Site and that Harbucks was therefore an "innocent purchaser" and an "innocent landowner" of the Site, entitled to the CERCLA § 107(b)(3) defense.

During the April 13, 1994 proceeding, Harbucks' representatives stated that they had spent one or two days in Commonwealth offices (referring to the Pennsylvania Departments of Health and Environmental Resources interchangeably) searching for documents relating to the Site and discussing the Site with State officials. Harbucks' representatives stated that they found no documents indicating that the site was contaminated, but did find many they said indicated it was clean. Harbucks representatives also stated that they provided this documentation to EPA in the past. Harbucks did not introduce any documents at the proceeding, but relied on certain State contractual documents associated with the 1970 cleanup effort, introduced into the record by EPA, for support of the argument that their records search had shown the Site to be "clean." (AR000035-AR000045). The "warranty" they allegedly obtained from Pennsylvania officials was oral. (Transcript, pp. 265-266, 316-317). There was no corroboration of this oral "warranty" at the proceeding.

Harbucks' representatives stated that they had taken reasonable precautions at the Site since their ownership, including the stationing of a watchman at the Site. (Transcript p. 273).

Harbucks did not make a post-proceeding submission.

EPA'S ARGUMENT

In its January 7, 1994 Reply to Harbucks' Petition of September 30, 1993, EPA provided a clear and detailed reaction to

the various arguments raised by Harbucks in its Petition, some of which are irrelevant to this Determination. (i.e. Harbucks' suggestion that EPA look to other PRPs, and the prediction of irreparable harm).

During the April 13, 1994 proceeding, addressing the relevant, disputed issues, EPA presented evidence of Harbucks' ownership of the Site, of the release and threatened release of hazardous substances at the Site, and of EPA's response and costs of response incurred at the Site. At the conclusion of the proceeding, Harbucks' representative conceded these elements in a dialogue with the Presiding Officer on the record, so they were not addressed in EPA's post-proceeding submission.

EPA responded to Harbucks' "innocent purchaser" argument in its post-proceeding brief. EPA argued that Harbucks failed to conduct "all appropriate inquiry into the previous uses of the property consistent with good commercial or customary practice in an effort to minimize liability." 42 U.S.C. § 9601(35)(B). EPA introduced two memoranda from the Commonwealth's files (EPA post-proceeding Exhibits EPA-12 and EPA-13), and an Order for Prevention of Erosion, Sedimentation and Pollution (EPA-11), that put Harbucks on definite notice of both prior uses of the Site and the conditions prevailing at the Site at the time Harbucks was considering its purchase.

EPA also challenged Harbucks' assertion that it had exercised due care it its association with the property, citing prior connections between Harbucks' principals and Site-related activities (EPA Post-proceeding Brief Exhibits 4-8) and a fire that broke out on the Site in March 18, 1984. (AR0000171, Transcript, pp.294-304).

FACTS

The relevant facts are:

1. Harbucks, Inc., a "person" as defined in section 101 (21) of CERCLA, 42 U.S.C. § 9601 (21), is the sole owner and operator of the property that is the subject of this proceeding. (Administrative Record, AR000001-AR000004, Transcript, p. 99, Exhibit P-1).

2. There has been a release, or threatened release which caused the incurrence of response costs, of a hazardous substance at the Harbucks property. (AR000006-AR000014, AR000081-AR000142, AR000168-AR000174).

3. The Harbucks property is a "facility" as defined in section 101(9) of CERCLA, 42 U.S.C. § 9601(9). (AR000006-AR000014,

AR000081-AR000142, AR000168-AR000174).

4. As owner of the facility, Harbucks is a potentially responsible party under Section 107(a) of CERCLA, 42 U.S.C. § 9607(a).[2]

5. EPA has incurred response costs associated with the Harbucks property. (AR000046-AR000048, AR000076-AR000078, AR000151-AR000153, AR000161-AR000166; Transcript pp. 210-232).

6. Harbucks' property is subject to or affected by a removal and a remedial action. (AR000006-AR000014, AR000081-AR000142, AR000168-AR000174).

7. Harbucks was provided with written notice of potential liability by EPA letter dated February 19, 1987 (AR000046-AR000049).

8. The liability for EPA's costs has not been fully satisfied nor has it become unenforceable through operation of the CERCLA statute of limitations.

DISCUSSION

Harbucks does not appear to be entitled to the CERCLA § 107(1)(b)(3) defense. Harbucks must be able to prove by a preponderance of the evidence that it exercised due care in order to satisfy this element of the CERCLA defense. The record does not support a finding that Harbucks did not know that hazardous substances were disposed of on the Site. Implicit in Harbucks' argument that it searched State records for a determination that the contamination had been adequately cleaned up is Harbucks' prior recognition of the contamination. Even assuming Harbucks did not know that hazardous substances had been released at the Site, they had reason to know. The State records contained ample information regarding the contamination, and despite Harbucks' representations that they found none of them, the record supports a finding that they should have. Physical examination of the property should also have provided Harbucks with some knowledge of the contamination, but all Harbucks was concerned about was whether the Site could be mined economically.(Transcript, p. 135).

As to EPA's arguments regarding Harbucks' principals having prior knowledge of Site activities, the mere fact that Harbucks principals, while acting other entities, had knowledge of

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[2] ...the owner and operator of a vessel or a facility...from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for all costs of removal or remedial action incurred by the United States Government. 42 U.S.C. § 9607(a).

activities associated with the Site, does not necessarily mean that Harbucks may be held to have the same knowledge. Harbucks' unsupported statements regarding Site security measures do not appear to meet the standard of preponderance of the evidence. Finally, with regard to the March, 1984 fire at the Site, the record shows that at the time of the fire, Area Homes, Inc., not Harbucks, seemed to have title to the Site, although later that year title was clearly reconveyed to Harbucks. The deed reconveying title recited that the real estate tax sale upon which Area Homes, Inc. based its claim to title was declared null and void. (Transcript Exhibit P-1).

Courts have held commercial purchasers to a high standard of care in connection with the purchase of land that turns out to have been contaminated at the time of purchase:

U.S. v A & N Cleaners and Launderers, 842 F. Supp. 1543, 1547 (S.D.N.Y. 1994):

> The second defense relevant in this case is the "innocent purchaser" or "innocent landowner" defense. In 1986 Congress created an exception to the "no contractual relationship" requirement of the third-party defense, thereby making the third-party defense available to some owners who acquired the relevant property after the disposal or placement of hazardous substances occurred. See 42 U.S.C. § 9601(35)(A). To plead this defense successfully, property owners must show, by a preponderance of the evidence, that the disposal of the hazardous substances occurred before they purchased the property, and at the time of the acquisition they "did not know and had no reason to know" that the substances had been disposed of at the facility. 42 U.S.C. § 9601(35).
>
> To qualify as an "innocent purchaser," one must have undertaken "all appropriate inquiry" into the previous ownership and uses of the property, consistent with "good commercial or customary practice" at the time of the transfer. "Good commercial practice" is not defined in the statute. The legislative history of this section is also vague on the definition of "good commercial practice," indicating only that it requires that "a reasonable inquiry must have been made in all circumstances, in light of best business and land transfer principles." H.R. Conf. Rep. No. 99-962, 99th Cong., 2d Sess., at 187, U.S. Code Cong. & Admin. News 1986, pp. 2835,3280 (1986). In

> deciding whether a defendant has complied with this standard, courts consider any specialized knowledge or expertise the defendant has, whether the purchase price indicated an awareness of a risk of contamination, commonly known or reasonable information about the property, the obviousness of the presence of contamination at the property, and the ability to detect such contamination by appropriate inspection. 42 U.S.C. § 9601(35)(B). (emphasis added).

Chesapeake and Potomac Telephone Company of Virginia v Peck Iron & Metal Co. 814 F.Supp. 1269, 1280-81 (E.D. VA 1993):

> The (property owners), individually, knew there was contamination at the property... CERCLA requires parties asserting the "innocent landowner" defense, in order to demonstrate that they had no reason to know of hazardous substance disposal, to make, at the time of acquisition, "an appropriate inquiry into the previous ownership and uses of the property consistent with good commercial or customary practice." 42 U.S.C. § 9601(35)(B). The record reveals that a question to their husbands, an inquiry of the state, or a cursory investigation of the Site would have revealed the existence of or potential for contamination. (emphasis added).

U.S. v Pacific Hide & Depot, Inc., 716 F. Supp. 1341, 1347-49 (D. Idaho, 1989):

> ...commercial transactions are to be treated differently than private transactions and inheritances. See 1986 U.S. Code Cong. & Admin. News pp 2835, 3279-3280. In fact, the legislative history establishes a three-tier system: Commercial transactions are held to the strictest standard; private transactions are given a little more leniency; and inheritances and bequests are treated the most leniently of these three situations... defendants did not obtain their interest in an arms-length private sales transaction...This is precisely the situation designed to be covered by the innocent landowner defense. (emphasis added).

Applying these legal standards to Harbucks' prepurchase investigation of the Site, I conclude that Harbucks has not shown that it did not know and had no reason to know that the Site had been contaminated by Echo's and Revere's use of the Site as a metal

reclamation facility. To the contrary, the record shows that Harbucks did know that the Site had been contaminated. Harbucks' purpose was described as follows: "...my business is mining material out of the ground and processing it for sale. There is on that property a gigantic deposit...of a stone we call argillite. The only reason I cared at that time was that I didn't want to have to crush a stone and market it, that had anything in it. So I went to the trouble to find out what the state of Pennsylvania had done, because I had heard they had done something." (Transcript, p. 135). Of course, the state records showed that hazardous substances had been disposed of at the Site. They also showed that some $500,000 had been spent in addressing Site hazards, and that environmentally harmful conditions persisted to the time of purchase. Accordingly, I find that Harbucks knew or should have known that hazardous substance had been disposed of at the Site when it made the purchase.

In light if the above finding it is not necessary to address the post-purchase level of care that Harbucks devoted to the Site, and therefore I need not determine whether Harbucks was the legal owner at the time of the March, 1984 fire.

CONCLUSION

There is simply nothing in the record of this proceeding to counter the lien filing record information, which supports a determination that probable cause, or a reasonable basis to believe that the requisite statutory criteria have been met, to file the lien notice. As to Harbucks arguments addressing EPA's enforcement discretion, one may observe that this probable cause determination does not mandate the filing of the lien notice under the law and applicable procedures and guidance; it merely clears the way for such a filing by confirming the grounds for doing so.

The Regional Judicial and Presiding Officer finds probable cause exists for EPA to file the proposed notice of Federal Lien.

DATE: NOV 2 1994

Benjamin Kalkstein
BENJAMIN KALKSTEIN
Regional Judicial and Presiding Officer